

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TABATHA R. McMILLION
Claimant

VS.

PAYLESS SHOE SOURCE
Respondent
Self-Insured

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Docket No. 172,742

ORDER

Claimant requested review of the Award dated March 30, 1995, entered by Special Administrative Law Judge William F. Morrissey.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for the claimant. James C. Wright of Topeka, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Special Administrative Law Judge awarded claimant permanent partial general disability benefits for a 7 percent work disability. Claimant asked the Appeals Board to review the issue of nature and extent of disability. That is the only issue before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Special Administrative Law Judge should be modified.

The Special Administrative Law Judge found that claimant injured her low back while packing shoes for the respondent on December 2, 1992. Because the parties did not dispute that finding or raise it as an issue, the Appeals Board adopts that conclusion as its own.

Because hers is an “unscheduled” injury, the determination of permanent partial general disability benefits is governed by K.S.A. 1992 Supp. 44-510e which provides in part:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee’s education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

The Special Administrative Law Judge found that claimant had a 44 percent loss of ability to perform work in the open labor market. However, because respondent accommodated claimant and returned her to work at higher wages, the Special Administrative Law Judge found that claimant had no loss of ability to earn a comparable wage. Claimant contends the work disability determined by the Special Administrative Law Judge is too low. On the other hand, respondent contends the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e is applicable because respondent provided claimant with an accommodated job paying a comparable wage. The Appeals Board agrees with respondent’s analysis.

According to claimant, since December 10, 1992, she has been performing a light duty job for the respondent which requires her to replace price tags in shoe boxes and repack those boxes. The Appeals Board finds that despite her back injury, claimant is capable of performing the accommodated job respondent has provided. Therefore, the presumption of no work disability is applicable. One of the primary purposes of the Workers Compensation Act is to restore the injured worker to a job earning a comparable wage. Because the respondent has accomplished that goal, the respondent is entitled to the statutory presumption of no work disability. Claimant has failed to establish that the

accommodated job respondent provided to her is somehow not appropriate. The Appeals Board finds that claimant is able to perform that job without violating medical restrictions. When viewing the record as a whole, claimant has not overcome the presumption of no work disability.

Based upon the testimony of P. Brent Koprivica, M.D., and William O. Reed, Jr., M.D., the Appeals Board finds that claimant's whole body functional impairment rating arising from the low back injury is in the range of 10 to 16 percent. Dr. Reed testified that claimant had a 10 percent whole body functional impairment due to the low back and Dr. Koprivica testified that claimant had a 16 percent whole body functional impairment. Although by letter dated August 5, 1994, Dr. Reed attempted to modify his opinions of functional impairment which he earlier provided at his deposition, that document is not admissible because of claimant's timely and appropriate objection. Dr. Koprivica found that claimant had a herniated disc at the L5-S1 intervertebral level, disc bulge at the L4-L5 level, and disc desiccation at those two levels as well as the L1-L2 level. Dr. Reed confirmed that claimant had a left-sided herniation and significant displacement of the nerve root at L5-S1. Because it appears both physicians' opinions are reasonable, in this instance there appears no valid reason to afford one physician's opinion of functional impairment greater weight than the other. Therefore, the Appeals Board averages the 10 percent and 16 percent ratings and finds that claimant's low back injury has resulted in a 13 percent whole body functional impairment upon which the Appeals Board finds appropriate to award permanent partial general disability benefits.

The Appeals Board hereby adopts the findings and conclusions set forth by the Special Administrative Law Judge which are not inconsistent with those made above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated March 30, 1995, entered by Special Administrative Law Judge William F. Morrissey should be, and hereby is, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Tabatha R. McMillion, and against the respondent, Payless Shoe Source, for an accidental injury which occurred December 2, 1992, and based upon an average weekly wage of \$260.28 for 415 weeks at the rate of \$22.56 per week or \$9,362.40, for a 13% whole body functional impairment.

As of November 29, 1996, there is due and owing claimant 208.29 weeks of compensation at the rate of \$22.56 per week or \$4,699.02, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$4,663.38 is to be

paid for 206.71 weeks at the rate of \$22.56 per week, until fully paid or further order of the Director.

The remaining orders contained in the Award are adopted by the Appeals Board to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Topeka, KS
James C. Wright, Topeka, KS
Office of Administrative Law Judge, Topeka, KS
Philip S. Harness, Director